



# ACC SOUTHERN CALIFORNIA IN HOUSE COUNSEL CONFERENCE

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**January 23, 2020**  
**Universal Hilton**

sponsored by: **Ogletree, Deakins, Nash,  
Smoak & Stewart, P.C.**



**#IHCC20**

# CCPA History and Why it was Enacted

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## ■ Cambridge Analytica

- The Facebook–Cambridge Analytica data scandal was a major political scandal in early 2018, when it was revealed that Cambridge Analytica had harvested the personal data of millions of people's Facebook profiles without their consent and used it for political advertising purposes.



# California Legislature Responds

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**The Legislature intent is to further Californians' right to privacy by giving consumers an effective way to control their personal information, by ensuring the following rights:**

- (1) The right to know what personal information is being collected.**
- (2) The right to know whether their personal information is sold or disclosed and to whom.**
- (3) The right of say no to the sale of personal information.**
- (4) The right to access their personal information.**
- (5) The right to equal service and price, even if they exercise their privacy rights.**



# Who Needs to Comply

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- Legal entity organized and operated for profit
- that collects consumers' personal information
- that does business in the State of California,
- and that satisfies one or more of the following thresholds:
  - Gross revenues over twenty-five million dollars (\$25,000,000)
  - Annually buys, receives, sells, or shares, the personal information of 50,000 or more consumers, households, or devices.
  - Derives 50 percent or more of its annual revenues from selling consumers' personal information.



# What is Personal Information under the CCPA?

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- Under the CCPA, “[p]ersonal information’ means information that:
  - identifies, relates to, describes, is capable of being associated with, or
  - could reasonably be linked, directly or indirectly, with a particular consumer or device.”



# Examples of PI, according to the CCPA:

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- **“Identifiers: real name, alias, postal address, unique personal identifier, online identifier, internet protocol & e-mail addresses, account name, social security, driver’s license, & passport numbers, or other similar identifiers.”**
- **“Characteristics of protected classifications under California or federal law.”**
- **“Commercial information: records of personal property, products, or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.”**
- **“Biometric information.”**
- **“Internet or other electronic network activity information.”**



# ADDITIONAL Examples of PI, according to the CCPA:

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- “Geolocation data.”
- “Audio, electronic, visual, thermal, olfactory, or similar information.”
- “Professional or employment-related information.”
- “Education information,” defined as “information that is not publicly available personally identifiable information....”
- “Reasonable inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer’s preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.”



# What is a Consumer?

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- The CCPA protects “consumers.”
- A “consumer” is a “natural person who is a California resident.”





# Are Employees Consumers?

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- What about employees; are they considered consumers?
- AB25 –Employee Information, Emergency Contact Information, & Benefit Plan Information Not Included Until January 21, 2021.
- Otherwise, Employees Are Consumers.
- Inform Employees of Information Collected 1798.100 (b).
- Employees Have Protections From Data Privacy Breaches.



# CCPA's Current Application to Employees

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- **Notices of the categories of information collected and the business purpose for collecting the information.**
- **Notices have to go to California employees, applicants, emergency contacts, beneficiaries, owner, directors, and independent contractors.**
- **Employees can sue for data breaches.**



# What Happens on January 21, 2021?

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- **Employees will have all the rights created by the CCPA including:**
- **Notice of the categories of information collected**
- **Disclosure of the information collected**
- **Delete the information collected**



# Information “Collected”

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- **Collecting personal information means “gathering, obtaining, receiving, or accessing any personal information pertaining to a consumer by any means.”**



# Possible Exceptions

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- **The obligations imposed on businesses by the CCPA shall not restrict a business' ability to:**
  - **Comply with federal, state, or local laws.**
  - **Comply with a civil, criminal, or regulatory inquiry, investigation, subpoena, or summons by federal, state, or local authorities.**
  - **Cooperate with law enforcement agencies concerning conduct or activity that the business, service provider, or third party reasonably and in good faith believes may violate federal, state, or local law.**
  - **Exercise or defend legal claims.**
  - **The collection of the information takes place entirely outside of California.**



# Business to Business Transaction?

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## ■ AB 1355:

- The CCPA Does Not Apply to personal information reflecting a written or verbal communication or a transaction between the business and the consumer when the consumer is acting as an employee, owner, director, officer, or contractor of a company, partnership, sole proprietorship, nonprofit, or government agency and whose communications or transaction with the business occur solely within the context of the business conducting due diligence regarding or providing or receiving a product or service.



# Employer Compliance

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What employers need to do to comply with the CCPA:

1. Provide notice at or before the point of collection to job applicants.
2. Provide notices to employees, owners, directors, officers, medical staff, or contractors (collectively, “employees”) about the categories of personal information collected.
3. Create/revise internal policies for the collection and handling of PI.
4. Train employees who handle PI.
5. Review service contracts and implement addenda to ensure compliance with “service provider” definition under CCPA.



# Publicly Available Information

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- **“Publicly available information:”** Information that is lawfully made available from federal, state, and local government records, or that is available to the general public.
- **“Publicly available”** does not mean biometric information collected by a business without the consumer’s knowledge.
- Information is not “publicly available” if that data is used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records or for which it is publicly maintained.
- **“Publicly available”** does not include consumer information that is de-identified or aggregate consumer information.





# Delay in Enforcement Actions

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- **The Attorney General cannot bring an enforcement action until July 1, 2020.**
- **Can look back on the 6 month period since January 1<sup>st</sup>.**



# Right to Cure

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- A business shall be in violation of CCPA if it fails to cure any alleged violation within 30 days after being notified of alleged noncompliance.
- Curing a data breach?



# Actions Under B&P Code 17206

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- **Attorney General can bring an action under Business and Professions Code Section 17206.**
- **Civil penalty not to exceed \$2,500 for each violation.**
- **The court shall consider: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the misconduct, and the defendant's assets, liabilities, and net worth.**



# Actions by Consumers

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- Any consumer whose non-encrypted or non-redacted personal information is subject to an unauthorized access and exfiltration, theft, or disclosure.
- Due to a business' failure to implement and maintain reasonable security procedures and practices appropriate to the nature of the information.
- Can recover damages in an amount not less than \$100 and not greater than \$750, per consumer per incident or actual damages, whichever is greater.
- Injunctive or declaratory relief.



# Statutory Damages & Class Actions

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- A consumer shall provide a business 30 days' written notice identifying the specific provisions of the CCPA the consumer alleges have been or are being violated.
- No statutory damages or class action if, within 30 days of notice, the business actually cures the noticed violation and provides the consumer an express written statement that the violations have been cured.
- No notice shall be required prior to an individual consumer initiating an action solely for actual pecuniary damages.



# Breach of the Express Agreement

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- If a business continues to violate the CCPA in breach of the express written statement, the consumer may initiate an action to enforce the written statement and may pursue statutory damages for each breach of the express written statement and for any other violation that postdates the written statement.



# Considerations for Statutory Damages

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- **The Court shall consider: The nature and seriousness of the misconduct; the number of violations; the persistence of the misconduct; the length of time over which the misconduct occurred; the willfulness of the defendant's misconduct; defendant's assets, liabilities, and net worth.**



# Notification of the Attorney General

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- **A consumer bringing an action for statutory damages shall notify the Attorney General within 30 days that the action has been filed.**





# What You Need To Do

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- **Determine whether the law applies to you.**
- **Identify the location and sources of PI.**
- **Put in place data privacy protections.**
- **Update your policies and procedures.**
- **Train your employees on the new policies and procedures.**



# What You Need To Do

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- **Implement reasonable security measures for HR data systems**
  - **Center for Internet Security (CIS) Standards**
  - **Update data handling policies and procedures**
  - **Conduct training**
  - **Review and update contracts with service providers**



# What You Need To Do

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- **Implement data breach notification procedure for HR data breaches**
  - **Update data breach notification procedures**
  - **Develop process for 30-day cure period**
  - **Review and update contracts with service providers**



# Consumer Notices

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## ■ If you collect consumer information for a business purpose:

- Notice to Consumers of their rights under the CCPA
- The company must put procedures in place to allow consumers to exercise their rights under the CCPA
- The rights: notice of the categories of personal information collected about them and the business purpose for collecting the information; disclosure of the actual information collected; the right to request deletion of the information; and opt-out of the sale of the information



# Financial Incentives

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## ■ Notice of financial incentives

- Succinct summary of financial incentive
- Description of material terms
- How the consumer can opt-in
- Notification of right to withdraw and how to exercise that right



# Privacy Policy

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## ■ Privacy Policy

- **Purpose:** “provide the consumer with a comprehensive description of a business’ online and offline practices regarding the collection, use, disclosure, and sale of personal information and rights of consumers regarding their personal information.”
- **How:** Conspicuous link using the word “privacy” on homepage or landing page of a mobile application.



# Privacy Policy

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## ■ Privacy Policy should include:

- Right to know about PI collected, disclosed, or sold
- Right to request deletion of PI
- Right to opt-out of sale of PI
- Right to non-discrimination
- Authorized agent
- Contact for more information
- Date the policy was last updated



# Service Provider Agreements

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## ■ Definition of a service provider

- For profit entity/organization
- Receives and processes personal information
- Bound by a written contract that prevents it from retaining, using, or disclosing consumer personal information “for any purpose other than the specific purpose of performing the services specified in the contract.”





# Service Provider Agreements

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- Statute requires that businesses disclose data sharing and the purpose for such sharing
- Statute distinguishes between service providers and third parties
- Review contracts now
  - Distinguish service providers from third parties
  - Modify as necessary before 1/1/2020



# Service Provider Agreements

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- **Prohibit recipients from**
  - **Selling personal information**
  - **Retaining, using, or disclosing personal information for any reason other than to perform your organization's services**
  - **Retaining, using, or disclosing the personal information outside of the relationship with your organization**



# Service Provider Agreements

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## ■ Obtain written certification

- Service provider understands the contractual restrictions
- Will comply with contractual restrictions



# Service Provider Agreements

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## ■ Prohibit recipients from

- Selling personal information
- Retaining, using, or disclosing personal information for any reason other than to perform your organization's services
- Retaining, using, or disclosing the personal information outside of the relationship with your organization

## ■ Statute distinguishes between service providers and third parties

## ■ Review contracts now

- Distinguish service providers from third parties
- Modify as necessary before 1/1/2020



# Questions?

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**2020 ACC SoCal In House Counsel Conference**





# **17th ANNUAL IN HOUSE COUNSEL CONFERENCE**

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**January 23, 2020**

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